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FEDERAL COMMON LAW AND INTERSTATE CARRIERS.

The question so long debated, whether there is a body of Federal common law, is neither complex nor difficult. It is answered in the negative by an express provision of the Constitution (Article VI, Par. 2) and by long judicial and political history. Still the question continues, and the demand for common law standards in Federal jurisdictions increases, until the reversal of established doctrines seems near.

What is the explanation of this remarkable history?

It is said that no question is settled until it is settled rightly,—but the question of Federal common law is a technical question, without moral quality. It would be sufficient perhaps, for purposes of legal administration, if the question were finally determined either way, but apparently not so. We have here a new phenomenon,—a question which will not rest until settled wrongly.

Such a situation would be comprehensible, if the establishment of a body of Federal common law would enlarge the powers of Congress or extend Federal jurisdiction. It is of the nature of power to seek extension, and there are many who would willingly see the authority of the Federal government enlarged. It is clear, however, that establishment of Federal common law would not have this effect, and is not sought for this purpose. The powers of the Federal government are enumerated by the Constitution. To these powers common law could add nothing, for it could exist under Federal authority only to the extent of that authority.

The question, then, is whether the common law is to be accepted by the courts as a substitute for Federal legislation in cases where Congress could have acted, but where in fact there is no Federal statute. In this aspect the question is not of great importance, for Congress can supply the needed remedy at any

time. There is, however, another aspect in which the question has considerable significance.

By the adoption of the Constitution, State laws upon many subjects were superseded by Federal jurisdictions which it was impossible for Congress at once to exercise. In respect to these matters, State law being abrogated, without the adoption of Federal statutes in its place, the question was of instant importance whether the lack of Federal legislation could not be supplied by common law rules. This very real emergency Congress at once set out to meet,—not, as would have been possible, by adoption of the common law to the extent of its constitutional authority, but by specific exercise of its powers. This course of legislation has been followed, so that every jurisdiction finds its governing rule in the legislation of Congress.

Still, the demand for a Federal common law persists, and as an unwritten law cannot supersede a statute, it is clear that it could be adopted only for operation in fields which Congress has not yet occupied. The necessary explanation, then, suggests itself, that as in the beginning the subjects upon which a Federal common law could act were those which had so recently been withdrawn from the power of the States, so now the only field for such a body of law must represent recent extensions of Federal power, new forms of centralization not yet fully recognized, the last development of judicial theories, or the mere weight of executive power,—in any event, advances of authority which are incomplete because not taken up by Congress.

It is this relationship between theories of a national common law and constitutional limitations upon the Federal government, which lends to the history of these theories their chief interest.

The Federal government was created by an express written enactment of the sovereign power. This fundamental law, so framed, granted certain specified powers to Congress, and the whole body of Federal law is embraced in the original written enactment and the laws which Congress has adopted. All Federal law may, therefore, be termed statutory. This is the express provision of the second paragraph of Article VI of the Constitution, which enacts that

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

There were treaties in existence whose binding effect on the new government was thus recognized. By another provision all existing debts and engagements of the Confederation were continued. No body of existing law was so adopted—could not have been adopted, for had the common law been established by the Constitution, it could not have been altered by Congress.

The Constitution could have provided that within the fields over which Congress was given power to legislate the common law should be in force until superseded by Federal statute. Such a provision would have displaced State laws on many subjects which the States can best control, and for the local self-government which Judge Cooley said "is part of the very nature of the race to which we belong"[1] would have substituted an untried and comprehensive centralization. This would have been far from the purpose of the Constitution and no such provision was made. Advocates of Federal common law theories are therefore compelled to face the alternatives, either that the common law is part of the Constitution itself, unalterable by statute, or on the other hand that it was not adopted by the Constitution at all. Between these two horns, hesitation is impossible. The Constitution did not adopt the common law.

From very early days there has, however, been a fear,—sometimes well founded,—lest in the administration of government it be discovered that Congressional legislation may have failed to cover some important subject. To guard against such omissions or deficiencies, many efforts have been made to establish the existence of a body of Federal common law,—in other words, to show that within the field over which Congress has constitutional power to legislate, the rules of the common law, unless repealed, have authority equal to a Federal statute, although not expressly adopted by Congress.

The first discussion of this subject appears to have arisen in 1793 over breaches of neutrality during the excitement aroused by the proceedings of Citizen Genet. Congress had not at that time adopted any law which covered such cases. Necessity demanded that the commission of hostile acts under the American flag be stopped, and through this influence even Jefferson was led to support a theory of Federal common law. The treaty with England, he said, established peace between the two nations; this treaty is the law of the land, and one who violates law may

[1]Note to Story on the Constitution, Sec. 280.

be punished by common law sanctions.[2] Mr. Justice Iredell entertained similar views,[3] as did many others.[4]

The subject of neutrality being promptly covered by statute,[5] the question soon passed from public view, only, however, to present another phase in the case of the *United States* v. *Worrall.*[6] This was an indictment for an attempt to bribe a Federal officer. No such public interests were involved as were presented by breaches of international neutrality, and Judge Chase decided against the common law theory. The case was of great political as well as constitutional importance. One of its fruits,—a strangely undemocratic application of its doctrine,—was the Sedition Act, which Congress passed soon after. Judge Chase's opinion—developed by Professor Tucker in an essay of which it is said that "he exhausted all the diversities, anomalies and antinomies that can be brought into any relation to the subject"—served as a text for the instructions of the General Assembly of Virginia to the Senators of that State in Congress, January 11, 1800.[7]

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[2]Letter to Monroe, July 14, 1793; letter to Gouverneur Morris, August 16, 1793.

[3]Life and Letters, Vol. II, p. 410, 561.

[4]Henfield's Case, Wharton's State Trials, 49. See "Dissertation on the Nature and Extent of the Courts of the United States," by Peter S. Du Ponceau (Phila. 1824) and review of this work in 21 No. Am. Rev. 104, 129.

[5]Act of Congress June 5, 1794, 1 Stat. L. 381.

[6](1798) 2 Dallas 384.

[7]"The General Assembly of Virginia would consider itself unfaithful to the trusts reposed in it, were it to remain silent, whilst a doctrine has been publicly advanced, novel in its principle, and tremendous in its consequences: That the common law of England is in force under the government of the United States! It is not at this time proposed to expose at large the monstrous pretensions resulting from the adoption of this principle. It ought never, however, to be forgotten, and can never be too often repeated, that it opens a new tribunal for the trial of crimes never contemplated by the federal compact. It opens a new code of sanguinary criminal law, both obsolete and unknown, and either wholly rejected or essentially modified in almost all its parts by state institutions. It arrests or supersedes state jurisdiction, and innovates upon state laws. It subjects the citizen to punishment according to the judiciary will, when he is left in ignorance of what this law enjoins as a duty, or prohibits as a crime. It assumes a range of jurisdiction for the federal courts, which defies limitation or definition. In short, it is believed that the advocates for the principle would themselves be lost in an attempt to apply it to the existing institutions of federal and state courts, by separating with precision their judiciary rights, and thus preventing the constant and mischievous interference of rival jurisdiction. * * *

"Deeply impressed with these opinions, the General Assembly of Virginia instructs the senators and requests the representatives from this state in Congress, to use their best efforts— * * *

As the Sedition law was the result of an effort by Congress, in the absence of Federal common law, to fill its place by statute, so when the act proved so unpopular as to threaten overthrow of the political party which brought it forward, a strong effort was made to represent the offensive statute as a mitigation of crimes previously subject to common law punishment. The Sedition law, it was argued, "makes nothing penal that was not penal before; gives no new powers to the courts, but is merely declaratory of the common law; libels against the government are offences arising under the Constitution (Sec. 2, Art. III) and consequently punishable at common law by the courts of the United States."[8] Whatever view might at the present time be taken of the law, there is little doubt, notwithstanding the argument of Mr. Justice Story[9] in its favor, that a hundred years ago its unconstitutionality was practically determined. "A vote against any assumed power," said Nathaniel Macon, "does nothing. The only case which I know, that was settled in the negative was the Sedition law."[10]

The *Worrall*[6] Case then, like the *Dred Scott*[11] Case, the *Legal Tender Cases*,[12] the *Northern Securities* Case,[13] and other decisions bearing upon political issues, occupies by reason of this connection a prominent place in national history. Its doctrine has been followed in all other decisions upon the subject. But, notwithstanding this judicial approval, the significance of the decision and the controlling effect which belongs to the case when rightly understood comes principally from the discussion which has centered upon the subject, and the favorable judgment which his-

"To oppose the passing of any law founded on, or recognizing the principle lately advanced, 'that the common law of England is in force under the government of the United States;' excepting from such opposition such particular parts of the common law as may have a sanction from the Constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government;—and excepting also such other parts thereof as may be adopted by Congress, as necessary and proper for carrying into execution the powers expressly delegated."

[8]See speech of Senator Mahlon Dickerson of New Jersey, Jan. 19, 1821, Annals 16th Cong. 2nd Sess. 191.

[9]Story on Constitution, Sec. 1294.

[10]Cong. Deb. Vol. IV, Part I, 106, Jan. 22, 1828; Speech of Philip P. Barbour, Feb. 26, 1828, *ibid,* Part II, 1645.

[11]Dred Scott *v.* Sanford (1856) 19 How. 393.

[12](1870) 12 Wall. 257.

[13]Northern Securities Co. *v.* United States (1904) 193 U. S. 197.

tory has pronounced upon it.[14] Even advocates of Federal common law theories are obliged to admit "that there is no longer any doubt that the Federal courts have no common law criminal jurisdiction, their criminal jurisdiction being confined to such offences as are defined and punishable under acts of Congress."[15]

So far as concerns the subject of common law, there is no constitutional provision distinguishing between civil and criminal cases, and in *Wheaton* v. *Peters*[16] the *Worrall*[6] rule was therefore applied in a civil case. "It is clear," the Court said, "there can be no common law of the United States. The Federal government is composed of twenty-four sovereign and independent States; each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption." To this opinion the Court in *Kendall* v. *United States*[17] added the statement that "The common law has not been adopted by the United States as a system in the States generally, as has been done with respect to this District."

There have been many efforts to restrict or countervail the effect of these decisions,[18] but without success.[19] In the presidential campaign of 1904, the subject became an issue between candidates of the two great parties and was widely debated.[20]

The most important connection in which the subject has recently arisen is in the case of interstate carriers by land. Whence

[14]See Report of Committee on Matthew Lyon's Fine, Jan. 12, 1833, Cong. Deb. Vol. LX, Part 1, 1010, 1654. Cong. Globe 26th Cong. 1st Sess. 411, June 1840. Debate in House of Representatives, January, 1807, Annals 9th Cong. 2nd Sess. 247, May 1809, Annals 11th Cong., Part 1, 75, 119, 12th Cong. 1st Sess. 346.

[15]"Federal Common Law," by Mr. Hunsdon Cary, 10 Va. Law Reg. 475, 478.

[16](1834) 8 Pet. 591.

[17](1834) 12 Pet. 524. Virginia Report of 1799-1800. Speech of James Johnson of Virginia, H. of R. Feb. 1819, 15th Cong. 2nd Sess. Vol. II, 1244.

[18]"Is there a Federal Common Law?", by Mr. Blewett Lee, 2 Northwestern Law Rev. 200. "Is there a Common Law of the United States?", by Mr. Rufus King, 24 Am. Law Rev. 322. "Is there a Federal Common Law?", by Mr. Wm. H. Russell, 52 Alb. L. J. 247.

[19]See opinion of Judge Kinne in Gatton *v.* Chicago etc. Railway Co. (1895) 95 Iowa 112; opinion of Judge Grosscup in Swift *v.* Philadelphia etc. Ry. Co. (1893) 58 Fed. 858, (1894) 64 Fed. 59.

[20]See Article on "Federal Common Law," by Mr. Hunsdon Cary, 10 Va. L. Reg. 475.

comes their duty to receive, carry and deliver? What law secures the right of the shipper to have his goods carried upon reasonable terms?

These questions are involved at the present time in no small difficulty, notwithstanding that the principles which should control the answer are fundamental and long established. The difficulty indeed is of very recent origin, arising solely from a current misapprehension of the nature of the Federal power over interstate carriers, and from the effort to found solely upon the basis of the commerce clause of the Constitution, powers which are in fact a development, arising from the application of the commerce clause to the enforcement of other constitutional provisions.

It has long been unquestioned law that the States cannot control commerce in respect to matters which are of national interest, or which admit of one uniform system, or plan of regulation. Upon the subject of interstate commerce, it is sometimes said, the States cannot act at all. There are, indeed, many local regulations which are within State power, and which appear to be essentially commercial in character and purpose, but under existing theories the power to make such regulations is not regarded as commercial in origin. When it is said that in local matters the States may act until superseded by Congress, it is intended to say that the States, in the exercise of other powers, are not prohibited from the use of all means which might be employed by Congress in effectuation of its general commercial power. This doctrine which developed from the long debate over *Gibbons* v. *Ogden*[21] and *Willson* v. *The Black Bird Creek Marsh Co.*[22] was announced in *Cooley* v. *Port Wardens,*[23] decided in 1851, has since that time been consistently followed, and "may be considered as expressing the final judgment of the court."[24]

A great system of law has been built upon the foundation of these decisions, defining the rights and powers of the States and the National government and their relations to each other. Decisions of Federal and State courts for sixty years have made this system part of the organization of government, of methods of taxation and administration. The industry of the country has developed in forms which such a system has made possible. Funda-

[21](1824) 9 Wheat. 1.

[22](1829) 2 Pet. 245.

[23](1851) 12 How. 310.

[24]Mobile *v.* Kimball (1880) 102 U. S. 691. 702.

mental change in this body of law is not now either desirable nor probably possible.

The rule, then, of *Cooley* v. *Port Wardens,* excluding from State jurisdiction all elements of interstate commerce which extend to and affect other States and admit of uniform regulation, must be regarded as finally established.

Now, the duty of interstate carriers to receive goods or passengers for transportation to other States, to exercise care in carriage, to deliver freight to the consignee, and the right to demand reasonable compensation, are of more than local importance. Rights and duties are not local which do not terminate at State lines, but follow the carrier into other jurisdictions until performance of the imposed duty is complete. These subjects are therefore beyond State jurisdiction and not subject to State statute or State common law. On the other hand, until the passage of the Interstate Commerce Act in 1887 there was no attempt on the part of Congress to deal with the subject, and even now Federal legislation relates to but a part of the field and is incomplete even in the part which it touches. Is it not necessary at this point to admit the existence of a Federal common law? This was the view of Judge Oliver P. Shiras in the case of *Murray v. Chicago & N. W. Ry. Co.,*[25] decided in 1894. He said:

"If the theory contended for by the defendant company be correct, then from the foundation of the government up to April 4, 1887, when the interstate commerce act took effect, it was open to all the common carriers engaged in foreign or interstate commerce to act as they pleased in regard to accepting or refusing freights, in regard to the prices they might charge, in regard to the care they should exercise, and the speed with which they should transport and deliver the property placed in their charge. What more disastrous restraint upon the true freedom of foreign and interstate commerce could be devised than the adoption of the doctrine that the inaction of Congress left the carriers engaged therein entirely free to accept and transport the property of one man or corporation, and to refuse to accept the like property of another, or to transport the products of one locality, and to refuse to transport those of another; to charge an onerous toll upon the property of one, and to carry that of his neighbour for nothing? Can it be possible that the transcontinental railways and other federal corporations engaged in foreign and interstate commerce, in the absence of congressional legislation, were not under any legal restraints, and that the citizen, in his dealings with them, was with-

[25] (1894) 62 Fed. 24, at 37.

out legal remedy or protection? In the absence of congressional legislation, what law could be applied to them, * * * except the principles of the common law or the law maritime? I cannot yield assent to the broad proposition that, as to those subjects over which congress is given exclusive legislative control, there is no law in existence if congress has not expressly legislated in regard thereto."

Here then is frankly the old argument *ab inconvenienti.* A field of Federal jurisdiction has been discovered, unoccupied for a century by any Federal statute, and yet from it all State law has been excluded. The situation was precisely that which had confronted the courts a hundred years before in the time of Citizen Genet, and Judge Shiras' decision repeated the doctrines which were first announced by Mr. Justice Iredell—of the authority, in the absence of Federal statute, of a Federal common law. This conclusion Judge Shiras supported by reference to the provision of the Constitution that:

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and a citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects."[26]

Upon this provision Judge Shiras said:[27]

"In this section we have a clear recognition of the existence of the several systems of law, equity, and admiralty. The section does not create these systems, but recognizing their existence, it declares the extent of federal jurisdiction in regard thereto. * * * The constitution does not create a system of maritime law, nor does it enact that the system, as prevailing in England or Europe, shall become the law of the United States; but, recognizing the fact that the law maritime was then in force in the colonies, it confers the jurisdiction upon the federal courts. The same is true of the equitable jurisdiction. * * * Is it not clear that the same is true in regard to the common law?

The argument was not new; it was answered by Mr. Madison in the famous Virginia Report of 1799. Many times since then

[26]Art. III, Sec. II, Par. 1.

[27]At p. 28.

it has reappeared and again been laid, until in Judge Shiras's opinion it has found its most persuasive form. Its defect is in the failure to distinguish between legislative powers of Congress and the judicial powers of the courts, a confusion noticeable sometimes also in Congress. It was upon the basis of this wide judicial power that Senator Sherman introduced into Congress a bill—subsequently abandoned—to prohibit combinations tending to prevent free commercial competition between citizens of different States, etc. He said:

"This jurisdiction embraces the whole field of the common law and of commercial law, especially of the law of contracts, in all cases where the United States is a party and in all cases between citizens of different States. The jurisdiction is as broad as the earth, except only it does not extend to controversies within a State between citizens of a State."[28]

The answer to this argument was that the legislative jurisdiction of Congress is not measured by the judicial jurisdiction of the courts. Federal courts enforce State law, and the law of foreign nations, in fields beyond congressional control. Whatever may be the extent of, and limitations upon, the authority of the courts, the power of Congress is not "as broad as the earth."

What, then, is the solution of the difficulties which confronted Judge Shiras? Is it true, as apparently was argued in that case, that up to April, 1887, "all the foreign and interstate commerce of the country was without the pale of law, and that there were no legal rules or principles which governed or controlled the relations between shippers or carriers engaged in that business"?

On the one hand, there is no Federal common law. Such a body of law may be established in the future, but this is certain —it offers no explanation of the facts of history.

On the other hand, if Federal power over interstate carriers by land is the same in origin as its power over navigation, the subject in all general aspects is entirely withdrawn from the operation of State law, and if not controlled by Federal law is subject to no law at all. This is the doctrine of *Cooley* v. *Port Wardens*,[29] the unquestioned law of the nation for nearly sixty years, the "final judgment" of the Supreme Court, adhered to in every subsequent decision. The dilemma cannot be explained by any theory which disregards the controlling force of this case.

[28] 21 Cong. Rec. 2460.

The fact is that from the beginning of our government to the present time, State law has controlled interstate carriers in the relations now considered.

The duty to receive, carry and deliver, for example, did not come from any Federal law, before the passage of the Interstate Commerce Act[29]; and it did come from State law.[30] Federal authority in this field has been hesitatingly exercised, and directed only to the correction of specific evils. Statutes enacted for these purposes have altered the existing body of law in certain particulars, but no further. In all other respects carriers are still subject to State law. The obligation to furnish ordinary freight cars, for example, comes from Federal statute, but the duty to furnish refrigerator cars, if it exist, arises from State law.[31] So, although a State may not regulate interstate freight rates, it may in some respects determine the service which shall be rendered for a rate fixed by the carrier or regulated by the Commission.[32] Moreover, the Federal statutes relate particularly to transportation by rail. Carriers not within these statutes, for example, those transporting by boats on Western rivers, or by horse and wagon, are still subject to the unquestioned powers of the States.

The conclusion is inevitable that Federal power over interstate carriers by land is not identical in origin or nature with its powers over navigation. There is no other solution possible.

What, then, is the source of Federal authority?

When the Constitution was established, and for nearly a century thereafter, the Federal power to regulate commerce among the States was limited to foreign and coasting trade. It did not extend over commerce conducted by land. Over interstate transportation, as such, Congress had no power. This power is now so well established that it is hard to believe that twenty-five years ago it was non-existent.

In 1822 President Monroe defined the phrase "to regulate commerce." He said:

"Commerce between independent powers or communities is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this Constitution, equally in

[29]Bowman *v.* Railway Co. (1885) 115 U. S. 611.

[30]Origin of the Right to Engage in Interstate Commerce, 17 Harv. L. Rev. 20.

[31]*Re* Transportation etc. of Fruit (1904) 10 Int. Com. Rep. 360.

[32]Pennsylvania R. R. Co. *v.* Hughes (1903) 191 U. S. 477.

respect to each other and to foreign powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other."[33]

In 1824 the Supreme Court, speaking by Mr. Chief Justice Marshall, held that a monopoly of coasting navigation, granted by New York over the waters within the State, was void because forbidden by the implied prohibition of the commerce clause, but the hundreds of State monopolies, over land transportation and over interior waters, then existing and thereafter created by State statutes, were in no way affected by this rule. The history of these monopolies has elsewhere been told.[34] In 1855, Mr. Justice McLean said that "the power to regulate commerce * * * had been exhausted" in Federal control of navigation.[35] In 1852 the Supreme Court said that a pretension of Federal power over land transportation

"would effectually prevent or paralyze every effort at internal improvements by the several States; for it cannot be supposed that the States would exhaust their capital and their credit in the construction of turnpikes, canals and railroads, the remuneration derivable from which, and all control over which, might be immediately wrested from them, because such public works would be facilities for a commerce which, whilst availing itself of those facilities, was unquestionably internal, although intermediately or ultimately it might become foreign."[36]

If the provisions of the Constitution relating to interstate transportation are to be understood, it is impossible to emphasize too strongly the fact that for more than seventy-five years after the adoption of the Constitution, Federal power over interstate carriers was limited to coasting navigation.

Gibbons v. *Ogden*[21] held that a State law granting a monopoly of steam coasting navigation within the limits of the State was void because Federal power over the subject was exclusive of all State action. Yet State monopolies of interstate land transportation had been in existence under the Constitution during the period of thirty-five years before this decision was rendered. Such monopolies existed in every State, they were numerous and important. The very judges who decided that a State monopoly of coasting navigation was void, rode to and from their circuits in stage

[33]Message to Congress, May 4, 1822.

[34]Federal Power over Carriers and Corporations (Macmillan 1907) Chap. III.

[35]United States *v.* Railroad Bridge Co. (1855) 6 McLean 517, 525.

[36]Veazie *v.* Moor (1852) 14 How. 568, 574.

coaches which by State law were beyond competition, and notwithstanding this conspicuous history, Mr. Justice Johnson said that the rule of *Gibbons* v. *Ogden* had been approved "by contemporaneous and continued assent," and Mr. Chief Justice Marshall said that an argument to prove a State monopoly of coasting navigation void was marked by "the tediousness inseparable from the endeavor to prove that which is already clear."

The Supreme Court, then, in 1824 recognized a difference in the constitutional rule governing transportation by land and transportation by coasting navigation. State monopolies of navigation were impossible thereafter, but monopolies of land transportation multiplied. The Supreme Court of New Hampshire held in 1834 that Federal power over interstate commerce did not interfere with these monopolies.

"Charters with exclusive privileges have been repeatedly granted, here and elsewhere. They have been deemed necessary to the promotion of enterprises of public utility, and have in many instances operated greatly to the convenience of the community, as the means of accomplishing improvements which would not otherwise have been undertaken, or must have been delayed to a much later period."[37]

The monopoly of transportation between New York and Philadelphia granted by the State of New Jersey to the Camden and Amboy Railroad was in existence during the Civil War, and of undisputed validity. Until within four or five years the corporation which maintained the bridge across the Connecticut River between Bellows Falls, Vermont, and Walpole, New Hampshire, has enjoyed a monopoly under New Hampshire law. When two States have each granted a monopoly for interstate transportation at the same point but not to the same person, difficult questions have arisen, and the Supreme Court has sustained both monopolies —each for transportation from the State by which the exclusive right was granted.

All this represents the views of the first century of the Constitution. They are important because they show that the powers over interstate carriers by land which the Federal government now possesses were not an original grant of the Constitution, but are a recent development. Modern statesmen, courts and legislators would give but short shrift to the old interpretation, but no power can alter the facts of history. Such was the Constitution, and such was the limitation upon Federal power.

[37]Piscataqua Bridge *v.* New Hampshire Bridge (1834) 7 N. H. 35, 63.

If now we would know the present powers of government, we must learn the source of these powers and follow the course of their development, we must trace the history by which these powers have come into existence, and by which their extent and limitations have been defined.

The simplest and most inviting suggestion is that Federal power was at first limited to navigation because in 1789 no other considerable means of transportation existed, and that when new methods were discovered they were at all times within Federal control. This, however, as has been seen, is untrue. It had a short-lived currency, following the presentation of the Windom Report[38] in 1874. To support this proposition the Report cited but three authorities. The first was *United States* v. *Coombs*,[39] where Mr. Justice Story said that the Federal power is not confined to acts done on the water but "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation."[40] In this case the "act done on land" was the theft from the beach of part of the cargo of a vessel which was "in distress and cast away on a shoal of the sea."

The second authority was a remark of Taney, *C. J., arguendo* in the case of *The Genesee Chief*,[41] and the third, the *Case of the State Freight Tax,* which will be considered. The doctrine of the Windom Report was repudiated by the Supreme Court, but it seems to have made a strong impression upon Mr. Justice Miller, who in his lectures published in 1891 thus stated his position:

"In *Gibbons* v. *Ogden* the eminent Chief Justice made a very elaborate argument to prove that navigation was one of the principal elements of commerce, which was perhaps necessary for him to do in that day although it is a proposition which it would certainly not be thought necessary now to establish by precedents or authorities. In fact we have gone further than that, and we have said that the transportation of goods and passengers is commerce. And in that view, in the case of the *Clinton Bridge,* reported in 1 Woolworth, 150, in 1867, in which I had the honor of delivering the opinion of the court, it was held, though I believe it has sometimes been doubted since, that since the railroads of the country had almost superseded the use of vessels and water carriage, they, as a means of transportation, constituted an element of commerce,

[38] Senate Report, 307, 43rd Cong. 1st Sess.

[39] (1838) 12 Pet. 72.

[40] At page 78.

[41] (1851) 12 How. 443, 452.

and that it was within the power of Congress to regulate that element." * * * In the *Clinton Bridge* case "the question was whether the Congress of the United States had power to authorize one of these railroads to build a bridge across the Mississippi River, at the town of Clinton, where two roads, one on each side met, and where it was necessary to have a bridge, I held that Congress having passed a statute authorizing it to be built, and declaring what the size and height of the bridge, and the width between its piers should be, the act was within the power of Congress, because it was a regulation of commerce. The Supreme Court sustained me in that, although some of the judges may have based their decision upon the fact that it was a bridge across a navigable stream and therefore within the control of Congress." [42]

At the present time, it is commonly assumed that Mr. Justice Miller's argument has been sustained, and that Congress now has over interstate transportation by land, the same power which it has from the beginning possessed over coasting navigation—indeed, it would probably be said that the identical power has been extended to include the new subject of land transportation.

This, plainly, is an erroneous view, for coasting navigation even between ports in the same State is within Federal power.[43] The test in these cases is not whether the vessel crosses State lines, but whether she navigates "public water of the United States." In the case of land carriers the test is the crossing of State lines. The two powers, then, are of different character. This becomes apparent upon examining their different origin and history.

The Federal power over commerce, Edmund Randolph said in 1791,

"extends to little more than to establish the forms of commercial intercourse between the States and to keep the prohibitions which the Constitution imposes upon that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports, preferences to one port over another by any regulation of commerce or revenue; and duties upon entering or clearing of the vessels of one State in the ports of another." [44]

So far as concerns commerce among the States, therefore, the rule of the Constitution was free ships, free goods, and, except in the foreign and coasting trade, non-interference with carriers. From these small beginnings the present Federal power has developed.

[42] Mr. Justice Miller, Lectures on the Constitution, (1891) p. 447.

[43] Hartranft *v.* Du Pont (1886) 118 U. S. 223.

[44] Opinion on U. S. Bank Bill, Feb. 12, 1791; see also Federalist, No. 42.

In *Gibbons* v. *Ogden*,[21] a case which concerned only the Federal power over navigation, the power was declared to be exclusive. In *Brown* v. *Maryland*[45] it was held that a State tax upon the sale of imported goods by the importer in original packages was prohibited, not only by the express provisions of the Constitution, but also by the commerce clause.

This, although apparently not so recognized at the time, was an important extension of the meaning of the commerce clause. Aside from the prohibition upon taxation of imports and exports, the Constitution, as understood when framed and adopted, imposed no limitations upon the taxing powers of the States.

"The inference from the whole is that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports." [46]

The great importance of *Brown* v. *Maryland* is that by that decision this construction was definitely disapproved. The holding of the case is, in substance, that the Federal power derived from the commerce clause, being an exclusive power, and including, as Randolph had said, power "to prevent taxes on imports or exports," amounted in effect to an original limitation upon State powers.

The new theory of construction, when adopted, may have seemed of small importance, for the tax then in question was in any event unconstitutional. In the *Case of the State Freight Tax*,[47] however, its real importance began to appear. The tax there involved was imposed by a State upon every ton of freight carried within its limits. Such a tax, the State authorities considered, was not strictly a tax upon imports or exports. On the other hand, the burden which it imposed, upon commercial intercourse among the States, was as substantial as it would have been, had it fallen within the precise terms of the constitutional prohibition. The Court said:

"It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or leave the State upon one of those railroads or canals, such an imposition would not have been a

[45](1827) 12 Wheat. 419, 445.
[46]Federalist, Nos. 33, 32.
[47](1872) 15 Wall. 232.

regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand." [48]

The tax was held invalid because prohibited by the commerce clause. The Court had, but a short time before this decision, held that the words "exports" and "imports" as used in the Constitution refer only to foreign trade.[49] The clause which was intended to forbid State taxation of interstate as well as foreign trade[50] having thus been so narrowed as to fail of its full purpose, the commerce clause was broadened so as to take its place, and, thus construed, was applied so as to operate upon interstate carriers not engaged in the coasting trade.[51] The widening of the Federal authority appears also in the reasoning and expressions of the Court in the case of the *State Tax on Gross Railway Receipts,*[52] although the actual rulings in both cases were consistent with early theories. In the first case a State tax on every ton of freight carried in Pennsylvania was declared unconstitutional, while in the second a tax upon the carrier of a certain sum for every dollar received was upheld,—the difference being that the first tax fell directly upon the shipper, while the second fell but indirectly upon the shipper and directly upon the carrier. So far as the Federal government was concerned, the amount which the carrier might charge for transportation was not a subject of regulation. "We concede," the Court said, "* * * the right of the owners of artificial highways * * * to exact what they please for the use of their ways." [53]

The subject was one which received great attention at that time both in and out of Congress.[54] Perhaps the first distinct asser-

[48]At p. 276.

[49]Woodruff *v.* Parham (1868) 8 Wall. 123.

[50]"Federal Taxation of Interstate Commerce," by Hon Simeon E. Baldwin, 22 Harv. L. Rev. 27.

[51]Something like this construction of the clause is suggested in Dr. James McHenry's "Notes on the Federal Constitution." Under date of Sept. 1, 1787, he says: "Perhaps a power to restrain any State from demanding tribute from citizens of another State" for navigating interstate waters "is comprehended in the power to regulate trade between State and State." See papers contributed by Professor Bernard C. Steiner to American Historical Review, April, 1906, Vol. II, p. 595.

[52](1872) 15 Wall. 284.

[53]15 Wall. at 277.

[54]House Report No. 57, 40th Cong. 2nd Sess., June 9, 1868, supporting Federal power to regulate rates, but with a strong minority report. Senate Report No. 462, 42nd Cong., 3rd Sess., Feb. 20, 1873. A majority of this committee pass over the constitutional question, because in any event op-

tion, by Congress, of any power to control interstate railway rates is found in the Act of July 25, 1866. This statute authorized a bridge across the Mississippi River

"upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge."[55]

Now the rates on the railways and public highways leading to the bridge were regulated by State law alone. Congress by this statute recognized the validity of these laws and of such future regulations as the States might adopt, and fixed the rates so established, or to be established, as the limit above which in respect to certain classes of freight interstate rates across the bridge should not go. The Federal power thus asserted was, in other words, an exercise of the power to keep open the ways from State to State. Recognizing the validity of State regulations of interstate rates, it asserted the power of Congress so to limit these rates as to prevent impediments.

In passing upon this statute in the case of *The Clinton Bridge*,[56] the court made no reference to the power over railway rates which Congress had asserted. Subsequently, however, even this moderate assertion of jurisdiction was disapproved. When the question of State authority arose again in 1874, the court repeated its former statement with greater emphasis:—

"This unlimited right of the State to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative—a sovereign—discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it. In this respect it is like all other legislative power when

posed to Congressional legislation at that time. A minority reported against the Federal power. Senate Report No. 307, 43rd Cong. 1st Sess., April 24, 1874,—the so-called "Windom Report," in favor of the Federal power, over the dissent of four members of the committee, including Roscoe Conkling. These minority reports deserve special notice because the view there stated was later approved by the Supreme Court.

[55] 14 Stat. L. 245.

[56] (1870) 10 Wall. 454.

not controlled by specific constitutional provisions, and the courts cannot presume that it will be exercised detrimentally.[57]

This doctrine was followed without question in 1876.[58] Ten years later this long considered and well established rule was changed. The old doctrine was not abandoned hastily, but because, in the language of Mr. Justice Miller,

"It is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation."[59]

The result of this decision was to place rates for interstate transportation beyond State power of regulation. The doctrine at this point was entirely negative. It may be that the Court did not contemplate extension of Federal power so as to occupy the jurisdiction so lately taken from the States, but extension soon proved necessary, and in 1887 Federal authority was asserted by passage of the Interstate Commerce Act, which dealt with some phases of interstate transportation when conducted by certain classes of carriers. Federal authority has also been extended in other directions, as by the decisions relating to State taxation of commercial travelers, to State laws excluding products of other States, or stopping interstate trains. In these and many other ways, Federal power to keep "undiminished" the prohibitions upon the States has been asserted.

The important feature of this history is that the power which Congress now possesses over intercourse among the States is not an original power granted by the express terms of the Constitution. Jurisdiction derived from the commerce clause, upon which so much emphasis is laid as a plenary power supreme over all State law, proves, if taken alone, in its constitutional meaning, to be narrow and insufficient even to support existing legislation.

The power of Congress rests, then, not upon this clause alone, but upon the commerce clause in connection with the limitations upon the States. It is, in fact, essentially a development of these limitations,—the establishment of a Federal jurisdiction to preserve intercourse among the States from unconstitutional impediments, a power to keep open the ways from State to State. Fed-

[57]R. R. Co. *v.* Maryland (1874) 21 Wall. 456, 471.

[58]Peik *v.* Chicago, etc., R. Co. (1876) 94 U. S. 164.

[59]Wabash Ry. Co. *v.* Illinois (1886) 118 U. S. 557, 570; reversing People *v.* Wabash Ry. Co. (1882) 104 Ill. 476.

eral authority over intercourse is the product of a history in which the limitations upon the States and the declared purposes of the Constitution have been of controlling importance; it is a resulting power, expressed only in the decisions of the Supreme Court, which have developed the existing jurisdiction and alone mark its extent and its limitations.[60] In this course of decisions may be found not only a monument to the great men who have sat upon the bench of that Court, but a lasting memorial of the constructive statesmanship of the Constitution.

"If there be any single fruit of our national unity," Senator Sumner said, "if there be any single element of the Union, if there be any single triumph of the Constitution which may be placed above all others, it is the freedom of commerce among the States, under which that free trade which is the aspiration of philosophers, is assured to all citizens of the Union, as they circulate through our whole broad country, without hindrance from any State."[61]

Without hindrance, indeed, from the United States itself, for the jurisdiction which Congress has acquired over the avenues of interstate trade is a jurisdiction to prevent impediments, an "element of union," in Senator Sumner's phrase, and does not authorize the closing of these avenues to any person.

It follows, therefore, from this history, that the power which Congress now possesses over interstate carriers by land is not an extension over new methods of transportation of the original power which it has had from the beginning to control coasting navigation. The decision of *Cooley* v. *Port Wardens*,[23] rendered in 1851, related to the original grant of power to control navigation, holding that power to be of an exclusive nature. To this extent, then, State power to regulate interstate commerce is limited by the commerce clause. Within this field of jurisdiction, State and Federal law cannot act together, for the subject is national in character, exclusive in nature and subject to Federal law alone.

It is far otherwise with land carriers, and the difference is not alone of the mechanics of transportation, but of the nature of governmental powers involved in regulation. Vessels engaged in coasting navigation may pass from port to port in the same State, but their navigation is upon public waters, often upon the high seas, in company with vessels of other nations, and therefore

[60] "Federal Power," Chap. V.

[61] Speech in Senate Feb. 14, 1865. 38 Cong. 2nd Sess. Cong. Globe, 793.

necessarily under national law and national protection alone. Land communication, on the other hand, is within control of the State, because conducted within its limits, subject to its laws.

Originally as a matter of history, and primarily as a matter of interest, communication between persons and places is of local importance. A man's first concern is to reach his nearest neighbors and his most convenient source of supply. The same is true of communities. As means of communication improve and transportation becomes easier, more distant communities come into touch, until finally communication is established between distant States. This, however, is but an extension of a service which is within State jurisdiction at every point.

The relation of such transportation to Federal powers comes with this final extension, and concerns only those features which affect other States. The primary relations of the carrier are to the State of its organization and operation. Federal control relates to but one of its functions, and to the carrier only in respect to, because of, and to the extent of its exercise of, that function. Concerning these matters, then, Congress may legislate, but the power has never been held to be an exclusive power nor does it displace State law. In this field of jurisdiction State and Federal laws work side by side, State law being of controlling authority in all details not superseded by the legislation of Congress. In the case of land carriers, therefore, there is no room for the operation of a Federal common law.

Here, then, is a harmonious body of law whose various doctrines are found in logical accord wherever brought together by operation upon related subjects. It may be that in the successive steps by which Federal control of interstate carriers has been constructed from a power to keep "undiminished" the rule forbidding States to tax imports or exports there was little consideration of the bearing of the *Cooley* case upon theories of Federal common law, but if so, the unexpected agreement of but distantly related principles shows that the conception of the Constitution which the Supreme Court has maintained for nearly a century and a quarter is marked by the consistency of a great system.

Modification of such a system involves consequences of which no end can be foreseen. An establishment of Federal power over carriers, for example, as an exercise of jurisdiction derived as an original grant from the commerce clause would either involve the overruling of the *Cooley* case, or would compel Congress at once

to enact a complete code of law for all kinds of transportation and probably for all kinds of interstate commerce.

The overturning of the *Cooley*[23] case with the perplexing questions which would at once arise in branches of law which now rest upon the decisions of half a century would be the lesser of the two evils.

"If the day should ever arrive (which God forbid!) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington, and when the self-government of the States shall have been so far lost as that of the Departments of France, or even so far as that of the counties of England,—on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever."[62]

E. PARMALEE PRENTICE.

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[62]Prof. John Fiske, "Critical Period," p. 238.